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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NO. 375

WESTERN CARTRIDGE COMPANY, a Corporation,
Petitioner,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PETITIONER.

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Cases Cited.

PAGE

Airway Electric Appliance Corporation v. Day, 266 U. S. 71 ..... 13, 15, 16, 17, 18, 19, 20, 21

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 19

Baltic Mining Co. v. Massachusetts, 231 U. S. 68 19

Cudahy Packing Co. v. Hinkle, 278 U. S. 460 ..... 13, 15, 18, 19, 20

Dahnke-Walker v. Bondurant, 257 U. S. 282 9

Gilliland Oil Co. v. Arkansas, 274 U. S. 717 13

Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290 ..... 1, 2, 4, 5, 8, 13, 19

International Paper Co. v. Massachusetts, 246 U. S. 135 ..... 18, 19, 20

International Shoe Co. v. Shartel, 279 U. S. 429 ..... 14, 15

Kansas City R. R. Co. v. Stiles, 242 U. S. 111 15

Kansas City, etc. Ry. Co. v. Botkin, 240 U. S. 227 15

Looney v. Crane Company, 245 U. S. 178 ..... 15, 18, 20

Pullman Co. v. Kansas, 216 U. S. 57 18

Roberts & Schaefer v. Emmerson, 271 U. S. 50 14

St. Louis-San Francisco Ry. Co. v. Middlekamp, 256 U. S. 226 15

St. Louis, Southwestern Ry. Co. v. Arkansas, 235 U. S. 350 ..... 14, 15, 21

Shaffer v. Carter, 252 U. S. 37 15

Southern Railway Co. v. Watts, 260 U. S. 519 15

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 ..... 13, 15

United States v. E. C. Knight Co., 156 U. S. 1 ..... 6, 9

United States Glue Co. v. Oak Creek, 247 U. S. 321 ..... 13, 15

Western Union Telegraph Co. v. Kansas, 216 U. S. 1 ..... 2, 18, 19

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MAY IT PLEASE THE COURT:

The argument on behalf of the respondent in this case is divided into four headings. These will be found, however, to rest upon precisely the same support. It will be found that this support is taken entirely, with possibly some developments, from passages in the decision of this Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290.

In directing the attack of the petitioner corporation against the position assumed by the respondent, it will be seen that we are, at the same time, disagreeing with the expressions

and also with the conclusion based on those expressions in the *Hump-Hairpin case* upon which reliance is put by counsel for respondent. This seems inevitable. If so, counsel for petitioner begs the indulgence of the Court in pointing out wherein the suggestions in the *Hump-Hairpin case*, which are seized upon by the respondent, are at variance with later cases decided by the Court. These later cases follow cases which had been decided by this Court before the decision in the *Hump-Hairpin* case and go back so far as to include the case of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and cases decided even before that outstanding case. This will necessarily be brought before this Court in the present argument.

It is necessary now to point out to the Court what the precise position is which has been taken by the respondent. Before stating that position, it may be well once more to refer to the statute in interpretation of which the litigation arises. This is Section 105 of the General Corporation Law of Illinois. The section is given in full on page 2 of petitioner's original brief. That part, which is under consideration here, is the requirement that every corporation, including foreign corporations, admitted to do business in Illinois—

> "Shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each $100 of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this State."

The question is whether the reported amount of business transacted by the corporation, petitioner, which consists of transactions in interstate commerce, is properly taxable as represented by its proportion of the stock of the Company.

The position of the respondent, Secretary of State of Illinois, is that the stock so representing interstate commerce must be considered along with the so-called factors, which

are contended to be factors, going to make up the whole interstate transaction.

It is claimed that these transactions which have been accurately described in the Stipulation of Facts, which forms part of the record in this case, are of necessity based upon—*first:* the manufacturing business out of which, performed in Illinois, the articles used in this interstate commerce came into being. *Second:* that contracts for sale to persons and corporations in other states and foreign countries of these articles were made in Illinois by the acceptance in Illinois of offers to purchase the goods, the offers coming to the offices of the petitioner from such other states or foreign countries; that in connection with such offers to purchase, or orders, the petitioner sent written acceptance from its places of business in Illinois to the purchasers' places of business in such other state or foreign country. The petitioner also delivered the goods packed and marked with the purchaser's address to a common carrier, at one or the other of the petitioner's places of business in Illinois, and a contract was thereupon made with the carrier evidenced by bills of lading by which the carrier agreed to deliver the goods at the address of the purchaser in such other state or country. In pursuance of this agreement between the petitioner and the carrier, the goods were then transported across the state lines of the State of Illinois and into another or other state or country, and delivered by the carrier to the purchaser in such states and countries other than Illinois.

The only question in this case is whether the stock representing such transactions may be subjected to the tax under Section 105 of the Act.

It is contended in answer that it would be impossible to find a clearer definition or description of a transaction which should be held to be a transaction in interstate commerce and protected *in toto* under the Commerce Clause of the Constitution under the decisions of this Court; which, with the single

exception of the *Hump-Hairpin* case have sustained such transactions as being so protected.

However, the following excerpts from the brief of counsel for respondent show that this is precisely his position.

(Page 4):

"Since all of the manufacturing business of the petitioner was carried on at its factories in Illinois and its products were shipped from such factories upon orders received and accepted at its offices in that State, the respondent considered all such sales as a part or measure of the business transacted in Illinois."

(Page 5):

"The position of the respondent here is that all of the business of the petitioner was in fact carried on at its factories and offices in the State of Illinois, and that the amount of sales made was merely taken as a measure or index of the amount of business transacted in that State; that such business, together with the amount of property in Illinois, represented the proportion of capital stock used in that State, upon which the annual franchise tax of petitioner was computed; that a tax assessed in that manner is not a direct tax upon interstate commerce, and did not constitute an illegal burden on any such business of the petitioner, under the prior decisions of this Court."

(Page 7):

"The manufacturing operations of the petitioner at its factories in Illinois, the receipt and acceptance of offers or orders for its product at its offices in that State and the shipment of such products from said factories constituted the transaction of business in that State, and the amount of the sales of such products was properly taken as the measure of the amount of such business for the purpose of computing its franchise tax, even though part of such sales were made to residents of other states."

(Page 10):

"The business of the petitioner did not consist merely in the final disposition of its products, but included its

manufacturing operations in Illinois to produce such goods, the receipt and acceptance of orders or offers for same at its offices in that State, and the shipment of such goods from its factories to purchasers in that and other states."

(Page 10):

"Such business was, therefore, transacted entirely in Illinois and only the shipment and final delivery of part of the goods to purchasers outside of the state had any element of interstate commerce."

(Page 11):

"The Court (Supreme Court of Illinois in present case) there pointed out that the petitioner's factories and offices were located, its manufacturing operations were conducted, orders for its goods were accepted and shipments of its products originated in that State exclusively."

Referring to and quoting from the decision of this Court in the *Hump-Hairpin case*, it was further stated in the brief:

(Page 12):

"The Court said that the fact that all of the property of the corporation was located in Illinois and all its manufacturing operations were carried on in that State, and all contracts for sales were approved at its office in that State, certainly reduced the interstate element in its business to the lowest terms."

So the argument goes on. Almost every page of the brief for respondent restates the same theory. It will be found on pages 13, 14, 21, 22, 23, 24, 25, 26, 28.

Here we have a brand-new doctrine. This doctrine has never received any consideration from this Court, unless in the *Hump-Hairpin* decision. It is impossible to say that any such doctrine has received any other support from this Court. On the contrary,—if there is any matter which has been treated with extraordinary care by this Court to ward off any assault upon the prerogatives of the Congress under

the Constitution, it is in this matter of the protection of interstate commerce from adverse legislation by State Governments.

In this case the Court has before it a genuine interstate commerce, as shown by the stipulation or agreed statement of facts which has been entered into by both parties. Nothing is clearer than that this is, we say again, genuine interstate commerce. Yet, it is, by an ingenious and thoroughly fallacious argument, so mixed up with a consideration of the preceding manufacturing activities of the corporation that it is subjected to a tax precisely as if the corporation did no interstate commerce whatever.

The distinction so well-known between the processes of manufacture on the one hand and commerce itself on the other hand, for the purpose of keeping interstate commerce away from the state control, has been wholly forgotten.

The leading case, in drawing the strict line between the business of manufacturing and the business of interstate commerce, is *United States* v. *E. C. Knight & Co.*, 156 U. S. 1. This was a bill under the Sherman Act to set aside the purchase by one of the defendants of four other sugar refineries engaged in the business of refining sugar. By the purchase of the stock of these four refineries, the American Sugar Refining Company acquired nearly complete control of the *manufacture* of refined sugar within the United States.

The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into these contracts the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations contrary to the Act of July 2, 1890, and asked for the cancellation of the agreements accomplishing the purchases and an injunction against the further performance of the agreements.

The Court held that the matter of the manufacture of the sugar was purely an intrastate affair and that it was in no sense to be connected with the interstate commerce which might follow from the manufacture of the refined sugar.

As to the nature of manufacturing, the Court said:

> "Although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it."

Again, the Court said, on page 13:

> "Contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce."

The Court is here speaking, of course, of regulation by Congress. Other statements might be quoted from this case, but it is needless to do so.

The distinction is clear. Now, we find that in the present case the respondent is seeking to find an opening for the State to derive revenue from a tax upon interstate commerce assessed by petitioner by the working of a new device.

Taking all the statements in the brief for respondent, his theory may be fairly stated thus: In spite of the words of the statute, there must be included, under the heading of business transacted in Illinois, all the interstate commerce of the corporation, for the reason that the goods used in such interstate commerce are assumed to be manufactured by petitioner in the State of Illinois at one or the other factory of the petitioner. This is bad enough as an invasion of the interstate commerce carried on by the petitioner. It is by

no means the worst feature. The petitioner also includes, as part of the business which goes to make up the interstate commerce, the making of contracts in Illinois for the sale of articles traded in by the respondent in this same interstate commerce.

Let us see what these contracts are. They are simply accepted orders for goods from purchasers in other states which the petitioner carries out by shipping the goods from one of its factories in Illinois to the places of business of the purchasers "in such other states or countries." There was also, as shown by the agreed statement of facts, contracts entered into with carriers, by which the carriers agreed to deliver the goods to the purchasers "in such other state or country than Illinois." In the case of each such offer or order, this was done pursuant to and in fulfillment of such provisions of said contract "between the petitioner and the purchaser."

In several of the statements made by the counsel for respondent, the making of these contracts is included as part of the business of the company transacted in Illinois, which to that extent reduces the quality of interstate commerce in the transaction described in the agreed statement of facts. It is true that the suggestion as to this seems to come from the case of *Hump Hairpin* v. *Emmerson*, 258 U. S. 290. In that case it is true that this Court, speaking by Mr. Justice Clark, said (page 293):

> "The facts that all of the property of the company was located in Illinois, that all of its manufacturing operations were conducted in that state, and that all contracts of sale must be approved at Chicago, where the only business office of the company was maintained, certainly reduce the interstate element in its business to the lowest terms."

With great deference counsel for the petitioner begs to say that this language, so far as the suggestion that the ap-

proval of interstate contracts of sale in Illinois gives to this interstate commerce in any way less the character of interstate commerce, is a suggestion directly at variance with the statements of this court in the case of *United States* v. *E. C. Knight Co., supra.* It is also contrary to *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282.

This was an action to recover damages for breach of contract. The plaintiff was a Tennessee corporation, and the defendant was a resident of Kentucky. They were parties to a contract made in Kentucky for delivery of wheat to the plaintiff. The wheat was to be paid for in Kentucky and was to be delivered on board the cars of a common carrier, and the plaintiff intended to ship it to Tennessee. The defendant refused to comply with this contract after a small initial shipment had been made. The plaintiff sued for damages.

The Court of Appeals of Kentucky reversed a judgment, which the plaintiff obtained, on the ground that it was not licensed to do business in Kentucky and could not maintain suit in that State.

This Court in discussing the decision of the Court of Appeals of Kentucky, said:

> "That court proceeded on the theory that, as the contract was made in Kentucky, related to property then in that State and was to be wholly performed therein, the transaction was strictly intrastate and not within the reach or protection of the commerce clause of the Constitution of the United States;—and this although the wheat was to be delivered on board the cars of a public carrier and the plaintiff intended to ship it to Tennessee as soon as it was so delivered."

This Court reversed the decision of the Court of Appeals of Kentucky and stated:

> "The commerce clause of the Constitution Art. I, Sec. 8, Cl. 3, expressly commits to Congress and impliedly

withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. * * * On the same principle, where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation. * * * This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri*, 91 U. S. 275, 280: 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.' In *Kidd* v. *Pearson*, 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' * * *

"The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce."

It seems clear then that the contracts to which reference is made in the brief for respondent, and also in the decision in the *Hump Hairpin* case by this Court, instead of tending to reduce the interstate element of the business of the petitioner to the lowest terms, is, on the contrary an essential part of the interstate features of that business.

The other element, which is introduced by the respondent so as to give the petitioner's interstate commerce more appearance of business transacted in Illinois, is, as has been shown, the use of the fact that the articles sold and transported in interstate commerce were, or may have been, manufactured in Illinois by the petitioner at one or both of its factories.

In the bringing in of this factor there is added a real element of vagueness so far as the making of any proportion of the amount of property and business located and transacted in Illinois to the total property and business of the corporation. There can be no doubt that the introduction of this outside fact as a factor in the interstate transactions of petitioner contributes a real confusion. What weight is to be given to this fact that the articles sold in interstate commerce happened to be manufactured by the petitioner at its Illinois factory? The secretary of state cuts the knot in a manner which obviates the necessity of any argument on the question, by designating all the interstate business of the petitioner as business transacted in the state. Therefore, in making out the proportion of the stock represented by this business it is all included as representing business in Illinois. No allowance of any kind is made for the more than $9,000,000 worth of interstate business as against the less than one-fifth of that amount of intrastate business. Here we have this amount of genuine interstate commerce,—admitted to be such,—to which in the proportion not the slightest recognition is given. This is a case where interstate commerce is actually taxed, and the tax justified on the sole ground that an earlier proceeding relating not to commerce, but to the manufacture of the articles of that commerce, is sought to be so interwoven with the interstate commerce as to reduce it to "the lowest terms" but leaving it still interstate commerce.

And what is this other element? Is it peculiar to the Hump Hairpin Company's case or peculiar to the present case of

the petitioner, in the transaction of their interstate business? On the contrary, these are elements which must adhere to every transaction in interstate commerce.

Is it not true that the interstate commerce carried on by the petitioner is like interstate commerce as it is done all over the country? It is not only interstate commerce, but as shown in the agreed statement of facts, it is typical interstate commerce; and yet, it is, in this case, sought to be burdened by a direct tax to which any typical interstate commerce might likewise be wrongfully subjected.

Is is not true that under the Commerce Clause of the Constitution a transaction is either one thing or the other? There are no degrees in interstate commerce.

There certainly are not two distinct kinds of interstate commerce, one of which is protected by the Commerce Clause and the other is not. The respondent says that the interstate commerce in this case is of the kind which is not to be protected by the Commerce Clause, because it partakes of the nature of business in the state. This is accomplished by showing that the articles transported in the interstate transactions were manufactured in the State of Illinois. That is the only reason which the respondent puts forward in order to save the tax.

What would be the result of the success of respondent's contention here?

If genuine interstate commerce can be burdened by a state tax by considering it as absorbed by the manufacturing processes under which the goods were made, then every protection to interstate commerce would have to be revised. In every case where goods manufactured in one state are sent across the state lines and sold in another state, such protection as they have received heretofore as being transactions in interstate commerce would have to be modified.

Counsel for respondent relies on four cases in support of this proposition. This first of these is *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S. 290, which underlies his entire argument. This case has been considered in petitioner's original brief in connection with the later decisions of this Court in *Airway Electrical Appliance Corp.* v. *Day,* 266 U. S. 71, and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460.

The discussion in this Reply Brief of the theory now offered by the Attorney General of Illinois in his brief, may also be considered as covering the comments in the *Hump-Hairpin* case from which the Attorney General has got his theory.

Counsel then cites the case of *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113. That case is clearly distinguishable from the present case. The tax there was computed upon the proportion of the *net* income of the foreign corporation which the value of its real and tangible personal property in the state bore to such property of the corporation everywhere. Such a tax falls within one of the clearly recognized exceptions.

As this Court stated in *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected, and a charge that is only indirect and incidental."

In addition, this Court pointed out in the *Underwood* case that:

> "The payment of the tax was not made a condition of the right to carry on the business, but its enforcement was left to the ordinary means of collecting taxes."

The case of *Gilliland Oil Co.* v. *Arkansas,* 274 U. S. 717, cited for Respondent (Brief, p. 16), was decided by this

Court in a *per curiam* decision on the authority of *Roberts & Schaefer* v. *Emmerson*, 271 U. S. 50; *St. Louis, South Western Railway Co.* v. *Arkansas*, 235 U. S. 350 and *Harris* v. *Bell*, 254 U. S. 103. The statements as to the business of the corporation set forth on page 16 of respondent's brief do not appear either in this Court's opinion or in the opinion of the Supreme Court of Arkansas, 117 Ark. 415.

The fourth case relied upon is *International Shoe Co.* v. *Shartel*, 279 U. S. 429. This Court there held a statute of the State of Missouri valid which imposed a franchise tax on the proportion of the outstanding capital stock and surplus of a foreign corporation that its property and assets in the state bore to all its property and assets wherever located. No-par value stock was taxed on the basis of $100 a share.

One of the objections urged against this tax was that it burdened the interstate commerce of the foreign corporation. This Court said:

> "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce. *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S. 226, 231 (ruling on the Missouri franchise tax); *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 119; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, etc. Railway Co.* v. *Botkin*, 240 U. S. 227; *Kansas City, etc. R. R. Co.* v. *Stiles*, 242 U. S. 111; *Southern Railway Co.* v. *Watts*, 260 U. S. 519; *cf. United States Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, 252 U. S. 37. The tax is distinguishable from those considered in *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, *Looney* v. *Crane Co.*, 245 U. S. 178, and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, which either were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state."

A consideration of the cases cited by this Court in the above paragraph, clearly shows the proper distinction.

Of the cases cited, *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S. 226; *Kansas City R. R. Co.* v. *Stiles*, 242 U. S. 111, and *Kansas City, etc. Railway Co.* v. *Botkin*,, 240 U. S. 227, involved taxes on domestic corporations. The tax in all of those cases was on the privilege of being a corporation, not on the privilege of doing business within the state by a foreign corporation.

The cases of *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, and *Shaffer* v. *Carter*, 252 U. S. 37, involved taxes on *net* income. The distinction between such cases and the present case have already been pointed out.

In *Southern Railway* v. *Watts*, 260 U. S. 519, the franchise tax was based on the property of the corporation within the state. In *St. Louis, S. W. Ry. Co.* v. *Arkansas*, 235 U. S. 350, the tax was on the proportion of the outstanding stock represented by property owned and used in business transacted in the state.

There is no connection between these cases and the present case where interstate commerce is included as business within the state. The present case is a case where the tax is not limited to the part of the capital stock justly apportioned to the taxing state.

It should particularly be noted that this Court expressly distinguished the tax involved in the *Shartel* case from that in *Airway Electrical Appliance Corp.* v. *Day*, 266 U. S. 71; *Looney* v. *Crane*, 245 U. S. 178; and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460.

These latter cases are decisive of the present case.

Counsel for respondent, in his brief, attempts to differentiate the *Airway* case by stating that a statute which measured a tax by authorized stock was held invalid for the rea-

son that nearly seven-eighths of the stock was unissued, and by further stating that the *Airway* case involved a tax measured by a large amount of unissued stock which afforded no basis for the tax assessed, and therefore imposed an illegal burden on interstate commerce.

Counsel for respondent then states on page 28 of his brief:

> "There is no similarity between that case and the present case, in which the tax was measured by issued stock actually invested in property used in business in the State."

The business of the *Airway Corporation* was carried on in the same way as the business of the petitioner. All of the property of both corporations was located within the taxing state. Their factories were located within the taxing state, and all shipments originated within the taxing state. Seventy-two per cent of the business of the *Airway Corporation* was interstate business, consisting of shipments from Ohio to customers outside the state. Eighty-three per cent of the business of the petitioner is interstate business, consisting of shipments from Illinois to customers outside the state. The interstate business in each case is the same kind, and is entitled to the same protection. There is no more reason for saying that the interstate business of the petitioner is merely an element in its general business of manufacturing which takes place within the state, and is, therefore, business transacted within the state and subject to be taxed, than there would have been to hold the same thing in the *Airway* case.

The Ohio taxing authorities did treat all of the *Airway Corporation's* business as business transacted in Ohio, but this was reversed by the District Court of the Southern District of Ohio in 3 Fed. 2nd 369, on the ground that including the interstate business was a substantial and genuine fettering of such business.

This Court held the tax invalid on the grounds that the use of authorized stock constituted a burden on interstate

commerce and was also a denial of equal protection of the laws. On the question of interstate commerce, this Court said:

> "All plaintiff's business, intrastate and interstate, and all its property wherever located, were represented by 50,485 shares of stock outstanding. * * * The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, *wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state.* In this case, the fee fixed by the commission was based on nearly eight times the number of outstanding shares, and that determined by the court on nearly six times that number. *As some of the outstanding shares are represented by plaintiff's interstate business,* the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce of the plaintiff."

(The italics in the above quotation are made by counsel for petitioner.)

This decision is directly applicable to the present case. The inevitable effect of a tax is to directly burden interstate commerce wherever the number of shares subject to the tax (whether authorized or issued) exceeds the number of outstanding shares "attributable to or represented by the corporation's property and business in that State." Interstate commerce is burdened wherever the tax is placed on more shares than the proportion represented by business and property within the state.

The interstate commerce was the same kind of interstate commerce as in our case. The Court said that some of the *outstanding shares* represented this interstate business. If it were some peculiar kind of interstate commerce which was not entitled to protection, it would not be burdened even

though the tax was placed on all of the stock. This is what would be done under respondent's theory in every case where the business originates within the taxing state; and it is what is being done in the present case (except for 2/10 of 1% of the stock of petitioner represented by property outside the State).

The holding of this Court in the *Airway* case is an express holding that interstate commerce of the kind in petitioner's case is entitled to protection.

This Court expressly held in the *Airway* case that the interstate commerce of the company was represented by some of the outstanding stock of the corporation. The interstate business of the petitioner is represented by part of the outstanding stock of petitioner. From the method of determining the proportion we can determine exactly what part of the outstanding stock of petitioner represents this interstate commerce. The formulas for determining this are set out in our original brief, pages 14 and 15.

Forty-seven and six-tenths per cent of petitioner's capital stock represents its interstate business.

Under the *Airway* case the interstate business of petitioner is burdened:

> "Wherever the number of shares subject to the tax exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state."

The decisions of this Court holding that a tax on all of the stock of a foreign corporation which is engaged in interstate commerce, necessarily involves a burden on interstate commerce are directly applicable to the present case. In all of these cases, including *Western Union Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 57; *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, this Court expressly held that such a tax was a burden

on the interstate commerce of the foreign corporation. The reason is clearly stated in *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 at 142, as:

> "The capital stock of the corporation represents all its business of every class and all its property wherever located".

Counsel for respondent attempts to distinguish these cases on the ground that in all of them the foreign corporation had property in other states and did interstate business in other states than the taxing state. These cases were expressly followed and applied in the *Airway* case where the interstate commerce was transacted in exactly the same manner as in the present case. The Court in these cases did not make any distinction between the interstate commerce originating in the taxing state and the interstate commerce carried on by the foreign corporation which did not touch the taxing state; and this Court in the *Airway* case has shown that there is no basis for such a distinction.

We have shown in our original brief that the decision of the *Hump Hairpin Manufacturing Corporation* v. *Emmerson* is not decisive of the present case, and we have shown in that brief, pages 25 and 26, that the cases cited in the *Hump Hairpin* case involved taxes which fell within certain defined exceptions enumerated by this Court with the solitary exception of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, which case has since been disapproved by this Court in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 and *Cudahy Packing Company* v. *Hinkle*, 278 U. S. 460.

These later decisions of this Court, together with the decision of the *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, are decisive of the present case. They have all been decided since the *Hump Hairpin* case and they all follow the clear decisions of this Court in the line of cases starting with *Western Union* v. *Kansas*, 216 U. S. 1, and continuing down

through *Looney* v. *Crane Co.*, 245 U. S. and *International Paper Co.* v. *Massachusetts*, 246 U. S. 135. These cases, as followed and applied in the *Airway* case and in *Cudahy* v. *Hinkle*, necessitate the tax in the present case being held invalid. It is based on all of the stock of the foreign corporation, except a small number of shares attributed to property outside the state. The interstate commerce of petitioner is represented by part of the stock so taxed. This interstate commerce is the same kind of interstate commerce as was protected by this Court in the *Airway* case.

Counsel for respondent argues that the same kind of treatment is shown to foreign corporations as is accorded to domestic corporations. This will not validate the tax if the interstate commerce of foreign corporations is burdened.

He also states that the tax does not vary directly with the amount of interstate commerce and does not increase or decrease in proportion t the amount of such commerce. We did not contend, in our original brief, that the tax itself would vary with the amounts of interstate commerce transacted by the corporation. Where the tax is laid on all of the stock, including that represented by interstate commerce, it cannot increase, regardless of any increase in the amount of business.

The more interstate commerce the corporation transacts, the greater is the proportion of the outstanding stock which represents that commerce. The burden increases directly with the amount of interstate commerce transacted by the corporation.

The tax in this case is a tax for the privilege of doing business within the state. Under the Corporation Law of Illinois a corporation failing to pay this tax is liable to be proceeded against for revocation of its license to do business. It is not allowed to file any papers in the office of the secretary of

state, nor transact any business, or maintain any action at law or equity within the state. The payment of the tax is made a condition of the right to do business. The State now requires the corporation to submit to a tax on its interstate business as a condition to the right to do a local business within the state.

The entire case for the respondent is based on the theory that the interstate commerce of petitioner is not entitled to protection and may be taxed by the State of Illinois because the property of petitioner is located in Illinois and because, as he contends, the interstate transactions of sale are a part of the manufacture within the state of the products of petitioner.

This Court in *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71, has held otherwise. A foreign corporation having its factories and all of its property located within a state and engaged in interstate commerce originating within that state is not engaged in a form of interstate commerce which may be taxed by that state.

The petitioner is a foreign corporation engaged in interstate commerce. It is taxed on 99-8/10 of its issued capital stock. Its interstate commerce is included as business transacted in Illinois in determining the proportion of its capital stock represented by property located and business transacted in Illinois. The tax so imposed is a burden on its interstate commerce and that burden is invalid.

As this Court stated in *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350:

> "But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form,

and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

It is respectfully submitted that the license fee or franchise tax imposed on petitioner by the State of Illinois is a direct and substantial burden on its interstate commerce and we ask that the judgment of the Supreme Court of the State of Illinois holding this tax valid be reversed.

Respectfully submitted,

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